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## THE LAW TEACHER : HIS FUNCTIONS AND RESPONSIBILITIES.

The notion that the teaching of the law is quite as much a profession as is the practice of it, and that it demands an intellectual equipment of a high order, is probably gaining ground. It is fully recognized by those who understand what systematic legal education, as carried on to-day in our leading law schools, really is. But as yet the majority of laymen, and very many lawyers, probably most lawyers who were educated under the old régime as well as most of those who have come to the bar through the law office, fail to appreciate the full significance of the calling of the modern law teacher and to give to him the recognition to which, by reason of his work and influence in his special field, he is entitled. They think of him either as a lawyer in full practice and a teacher only as his professional engagements permit, or as a judge upon the bench and a teacher incidentally, or as one who has failed at the bar and is teaching law because unequal to what they regard as the more strenuous and virile work of the practitioner. This is natural, for undoubtedly a majority of the law teachers of the last generation were practitioners or judges first, and teachers only to the extent that private business or judicial duties would permit; and it is the law teacher of the last generation with whom the public and members of the profession to which reference has been made are most familiar. It was, of course, the fact that it sometimes happened, particularly in the older eastern university schools, that a distinguished practitioner abandoned his work at the bar, or that a judge resigned from the bench, to accept a law professorship as his chief occupation; but in the country generally it was the exception for a person to choose the teaching of the law as a life calling, and but few of the schools had upon their faculties any considerable number of men who were devoting their predominant energies to the work of legal education. These statements have reference to conditions after regular law schools had been established, and not to earlier times, when in several of the universities there were professorships of law which in some instances were filled by resident instructors. The law school of thirty years ago, even the university law school, was certainly a very different place from the law school of to-day. While the attitude of its faculty

toward the work of teaching and in regard to the cause of sound legal learning may not have been one of indifference, it was yet the attitude that naturally and inevitably comes from such a situation, an attitude that prompts a person to give his best thought and to exert his best energies along the lines of the dominating interest. And so it was that under the old régime the law teacher, as a rule, exercised an influence upon the profession and upon the jurisprudence of the country, not so much through his work as a teacher as through his labors at the bar or upon the bench or in the field of authorship. With few exceptions, the law teacher of the last generation was a law teacher only as an incident. On account of the attitude of the profession toward the schools, which was distinctly hostile, he was not always sure, probably, as to the real value of his work as a teacher. In a word, the conditions dominating legal education were such that the man of force and learning and constructive ability would rarely consecrate his life and energy to that cause alone.

It would, however, be a grave mistake to suppose that little was accomplished under the old régime. But for the work of our predecessors in law teaching, the extended and growing influence of the law schools of to-day could not have been realized for years to come. It goes without saying that the initial steps in every great movement must be largely experimental. What the attitude of that part of the public that is to be affected by the change will be, cannot ordinarily be ascertained in advance with any degree of certainty. It must be learned by experience, and the movement as it proceeds must in a measure conform to existing conditions. It may at times be necessary to recognize for a period standards that under more favorable circumstances would be regarded as far too low. And to meet public prejudices concessions must not infrequently be made. Forty years ago the few law schools of the country existed, not in response to a demand from the profession, but in spite of the profession. The average practitioner of even a much more recent date regarded law-school instruction with suspicion, and advised against it. The theoretical work of the schools seemed to him but a poor preparation for the practical work of the bar. Devoted to his profession as an art, he magnified the importance of the mechanics of the calling, so to speak. In his enthusiasm for practical things, he too often lost sight of the fact that the law is first of all a science, and that it must be mastered as a science by the one who

would apply it in a large way as an art. To overcome the prejudices of the profession against systematic and formal instruction in the law; was a great and pressing problem with the law teachers of an earlier date. The extent to which they succeeded in turning the tide in the direction of the schools and the effectiveness of the work of their successors in that regard, while well known to those who are familiar with the history of legal education in this country, are not generally understood by the public or indeed by the profession.

In this connection, therefore, the following facts are significant: In 1870 the number of law schools in the country was twenty-eight, and the number of students in attendance sixteen hundred and fifty-three. Figures in regard to earlier years are not easily ascertained or verified, but it is probable that in 1840 there were less than four hundred law students in the eight schools in which instruction in the law was then given. During the period of thirty years, then, in which the population of the country had a little more than doubled, the number of law students taking instructions in the schools had increased more than fourfold. In the next decade the number of schools increased to forty-eight and the number of students instructed in the schools to three thousand one hundred and thirty-four. The population of the country had, of course, increased in the meantime, but not to an extent that would account for the increased attendance upon the schools. That the schools were at this time receiving more general recognition from the profession is apparent, not only from the increase in the number of students attending, but also from the attitude of the profession as expressed through its leading association. In a report submitted in 1879, the Committee on Legal Education of the American Bar Association said: "There is little, if any, dispute now as to the relative merit of education by means of law schools and that to be got by mere practical training or apprenticeship as an attorney's clerk. Without disparagement of mere practical advantages, the verdict of the best informed is now in favor of the schools." The next year this association, following the suggestion of the report of its committee, from which the foregoing quotation is taken, recommended that "the several state and local bar associations be requested to further in their respective states the maintenance of schools of law." That the request was effective is apparent from the fact that, twelve years later, so numerous had become the schools that a com-

mittee of the same association felt constrained to "deprecate the needless multiplication of law schools." During the ten years from 1885 to 1895 the attendance upon the law schools nearly trebled, the attendance during the latter year being only a little less than ten thousand, while the population of the country increased only twenty per cent. In 1906 the attendance had reached fifteen thousand four hundred and eleven, and the number of law schools had increased to ninety-eight.<sup>1</sup> It is probable that at the present time seventy per cent. of the lawyers come to the bar through the law schools.

While the growth of the law schools has been more pronounced under what may be called the new régime than it was under the old, yet the figures show that the schools received under the latter a patronage and recognition that indicated a changed attitude on the part of large numbers of the profession. And this changed attitude was undoubtedly due in a very great degree to the fact that the law teachers of the last generation were, as a rule, not only teachers, but also practitioners and judges of commanding ability and extended influence. That such men were connected with the schools must have challenged the attention of practitioners and students to what could be accomplished through the schools. Moreover, the earlier teachers were generally men of distinct personality, as well as of great learning—men whose qualities of mind and heart would naturally attract. They also had the good judgment to adapt their instruction to the needs of the practitioner, rather than of the legal scholar, and to make their standards such that they were not beyond the reach of the people. They had the wisdom to keep in touch with existing conditions and to humor to a degree existing professional prejudices, knowing full well that to deflect the trend of professional opinion towards the schools they must consult the requirements of the profession and avoid sudden and radical changes. In the way of gaining recognition of the schools by the profession they accomplished probably what could not have been accomplished by men of the type of the modern law teacher.

But while the honor of having secured from the profession and the public so extended a recognition of the value of law-school instruction as a preparation for the bar must be accorded in a large degree to the teachers under the old régime, it is quite apparent

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<sup>1</sup>The figures as to the law-school attendance since 1870 are taken from the reports of the Commissioner of Education.

that they directly contributed comparatively little to the development of systematic legal training. They were pioneers in law-school instruction; they took the first step; they had the courage necessary for the experiment, and they demonstrated that law could be taught in the schools and better results obtained than from reading in an office, even though it was taught without particular regard to the proper relation of the subjects or their historical and logical development. But apparently they gave little or no thought to the proper organization of the law school, to its functions as a unit in university life and development, or to scientific method in law teaching and study. Their predominant interests were not distinctly educational. The result was a condition that to-day would be regarded as intolerable and that would then have discredited the entire movement but for the fact that those identified with it were men whose ability, learning and standing were such that they could carry it on in spite of fundamental defects. The condition in the Harvard Law School in 1869, as described by the late Dean Langdell, is probably typical of conditions elsewhere; and it certainly is, to the personal knowledge of the writer, of the condition in the Department of Law of the University of Michigan at about the same time. He says: "In respect to instruction, there was no division of the school into classes, but, with a single exception, all the instruction given was intended for the whole school. There never had been any attempt by means of legislation to raise the standard of education at the school, or to discriminate between the capable and the incapable, the diligent and the idle. It had always been deemed a prime object to attract students to the school, and, with that view, as little as possible was required of them. Students were admitted without any evidence of *academic* acquirements, and they were sent out from it, with a degree, without any evidence of *legal* acquirements. The degree of Bachelor of Laws was conferred solely upon evidence that the student had been nominally a member of the school for a certain length of time, and had paid his tuition fee—the longest time being one and a half years."

It is perfectly apparent to one familiar with the facts that the permanent victory of the law schools could never have been achieved but for a radical change of policy. University authorities finally became quite generally convinced that, if law were a proper subject for university instruction and study, work in this field

should be placed upon a university basis. They did not abandon the notion that the primary work of the law school should be to fit young men for their duties as practicing lawyers, but they rather adopted the additional notion that the best possible training for such duties is the scientific study of the law from the sources in accordance with a carefully arranged plan and under the direction of men whose predominant energies are given to the work of investigation and teaching. The carrying out of this meant a complete reorganization of the schools, a change of methods, and, above all, the development of a body of trained law teachers. And this is what the leading law schools have been and still are seeking to accomplish. Although legal education must as yet be regarded as, in a measure, within the transitional and experimental stage, most gratifying results have already been realized. Moreover, the future promises much. Requirements for admission to the university schools have been materially increased, a course of study covering three years, the subjects of which are arranged with a view to their proper order and relation, has been very generally adopted; the end sought through the present methods of instruction is, not only the mastery of legal principles, but the development at the same time in the student of the power of legal reasoning, and, most important of all, the teaching of the law under the stimulus and opportunities of modern changes has become a profession that is attracting many forceful and scholarly men who would rank as leaders in any calling. "It is the simple truth," said the late Professor Thayer, "that you cannot have thorough and first-rate training in law, any more than in physical science, unless you have a body of learned teachers, and you cannot have a learned faculty of law unless, like other faculties, they give their lives to their work."<sup>2</sup> The university authorities now recognize this truth to the extent at least of realizing that the law teacher should devote his life to the work. And it is upon the general recognition by universities, the profession and the public, of the truth in its entirety that the future effectiveness of our law schools and the scholarly development of our jurisprudence must very largely depend.

The primary function of the law teacher is undoubtedly to teach, but, while this is true, it would be a mistake to conclude that his time and energy should be entirely absorbed, or indeed absorbed in any very large degree, in the formal work of imparting instruc-

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<sup>2</sup> Thayer's Legal Essays, 374.

tion. Before a man can teach properly he should know, and before a man can count himself master of any subject it must be his to the extent of its length and breadth and depth. A first requisite of effective law teaching, as is the case in other fields, is profound scholarship—not the scholarship of the practitioner who investigates from time to time parts of subjects to meet immediate professional demands, but the scholarship that comes from scientific and systematic study in a rather limited field of our jurisprudence. No man can know all the law, but it is entirely possible for one to supplement a general knowledge of legal principles by exact and comprehensive acquirements in one or two departments of the law. The ideal law teacher is the one who naturally has the teaching power, who has had practical experience at the bar, and whose practical experience has been supplemented by the labors of the scholar to such an extent that he is master of the ordinary problems that lie within the field of his specialty and well equipped for the solution of the extraordinary ones. But if our law schools generally are to have such teachers, further changes are necessary. The initial step toward the realization of such an end has been taken in the very general recognition by university authorities that it is of the first importance that the law teacher should confine his efforts to work within the field of legal education. The next step is the conversion of these authorities to the notion that the law teacher should never be required to cover in his work more than a comparatively limited field. It is quite as absurd to expect a law teacher to become a master of half a dozen disconnected subjects in the law and to speak and write in regard to them with authority as it would be to expect a teacher in the field of science to compass in his work half a dozen different sciences. The result, if such an attempt is made, must necessarily be to make of a man a retailer, so to speak, of second-hand opinions, and, through the exhaustive work of the many class exercises that the extent of the field necessitates, to incapacitate him for independent work as an investigator. The weakness of the law schools of to-day is to be found, not in faulty methods of instruction or in a dearth of brainy and energetic men upon the faculties, but in the fact that, as a rule, the law teacher is expected to be familiar, for the purposes of the class room, with so wide a range of subjects. In the first place, he cannot, under present requirements, have, as a rule, the solid and substantial knowledge that every law teacher should have. And,

furthermore, no one can be the slave of such a system for many years without the loss of effectiveness, for the tendency of work under such conditions is to crush out that which in the teacher is so essential—the enthusiasm and freshness that come from the consciousness of having done something worth while in one's chosen profession. No good reason can be advanced for the providing of ways and means for thorough and effective scholarship in teachers of literature, history, science, or any other recognized university subject, that is not also a reason for the providing of such ways and means for effective scholarship in teachers of law. If law is to be a university subject at all it should be, so far as opportunities for the cultivation of a scholarly attitude in regard to it are concerned, upon the basis of other university subjects. To put it there, a material increase in the number of the teaching force in most of our law schools—such an increase that the instructor may be limited either to a single subject or to two or three closely related subjects—would be necessary. This would mean, of course, large additional expenditures and the very general abandonment of the notion that possesses some governing boards that the law school should be a paying part of the concern and should willingly contribute from its surplus to aid less remunerative departments. Not until such expenditures can be made will it be possible for law teachers generally to enjoy the opportunities that are essential for profound scholarship. Under present conditions it is only the exceptional man who can rise above the ordinary. Not that all would become jurists of distinction if materials and time for scholarly investigations were at their disposal, but the general standard of scholarship would be materially advanced, and a much larger number than at present would become recognized specialists in their respective fields.

Not only should the law teacher be the master of his subjects from the point of view of the legal scholar for the purposes of instruction, but he should be so because it is his duty, as being clearly within the functions of his calling, to make permanent contributions to the store of legal knowledge. If he can have the time necessary for thorough investigations, no one is more favorably situated than he to do original and effective work in the field of authorship. In the first place, his environment and the demands upon him as a teacher impel him to approach his task in the scholarly spirit and to seek to exhaust all that the authorities have

to yield upon the subject. And, secondly, he is unhampered by professional engagements and by professional ambitions that might at times serve to color conclusions. Furthermore, he is free to criticize judicial precedents and to urge changes and reforms to an extent that might be embarrassing to one occupying a place upon the bench, or indeed to one practicing at the bar. In a word, the law teacher is in a situation to show, through the publication of the results of his work, not only what the law within a given field has been and is, but also what it should be. If he is wise and conservative and judicial, as well as scholarly, in his attitude he may do constructive work of great importance in the way of reforming our jurisprudence. It has been well said that no wise and well-directed efforts in the field of legal reform "can dispense with the approval and co-operation of the legal scholar."<sup>3</sup> But without regard to changes and reforms, every generation needs and must have a restatement of the law in its principal departments, and it is certainly within the legitimate functions of the law teacher to contribute a large part of the scholarly work by which alone such restatement can be made most useful to the practitioner and a distinct contribution to the science of jurisprudence. It is within the function of the law teacher, I say, to contribute a large part of the scholarly work for such restatement. It is perhaps unnecessary that I should add that in my judgment it is no part of his duty to engage in "pot-boiling" authorship, and that it is a matter of profound regret that so many able men are compelled, because of the meagreness of their university compensation, to exhaust their energies and in a measure unfit themselves for better things by the drudgery of mere compilation. The authorship to which the law teacher should aspire is the authorship of the learned and exhaustive treatise that marks an epoch in the history of the subject considered. Several such works already stand to the credit of the schools; some of them are recent and as yet not thoroughly known, but they are appreciated by those who have tested their merits; others have been so long and so favorably received that they have attained an authoritative force but little inferior to that of judicial decision. It should be remarked, moreover, that works of the character indicated are not of value simply to the lawyer and student of jurisprudence. They are of general value, for they are distinct contributions to the history of our civilization. It is in its

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<sup>3</sup> Thayer's Legal Essays, 363.

law and its legal history that the quality and characteristics of the civilization of a country are most vividly reflected; and, therefore, in a sense, every scholarly contribution to law is a contribution to history. It is to be hoped that substantial relief from routine duties will give to the law teacher of the future larger opportunities in the field of research and legal authorship than the teacher of the present enjoys, and that the results of his work will justify the change of policy.

But, while the scholarly attitude is of the highest importance and should be cultivated by the law teacher, it would be a mistake to conclude that he has performed his whole duty by making himself the master of his specialty and contributing somewhat to the general store of legal knowledge. He should be more than a legal scholar—more, indeed, than a good teacher. He has, of course, incidental duties connected with the shaping of the policy of his school and of the university of which it forms a part. But without dwelling upon these, although they are by no means unimportant, I beg to suggest that, by virtue of his calling and his responsibilities to the profession, *public* functions devolve upon him that are quite as imperative as those that have to do with scholarship, or with questions of departmental or university policy. It always has been very largely through his efforts that standards for admission to the study of the law have from time to time advanced as the opportunities for preliminary training have come to be more generally within the reach of the people, and it is upon him that the burden of securing higher standards for the future must chiefly rest. The law teacher realizes, more keenly probably than any one else, because his attention is constantly challenged to the fact that, as a rule, the strongest students in law are those who have had an extended and systematic preparatory training. It stands to reason that this should be so. The law is an intensely intellectual profession, and the successful study of our jurisprudence requires the mastery and control of one's intellectual processes and the development of one's reasoning faculties to a degree that is ordinarily attained only after long disciplinary study. Of course, in dealing with this problem of preliminary requirements, we must recognize—and the law teacher certainly does, for it is not infrequently brought to his attention—that some men are fitted by nature for the study and practice of the law, and that with such men the matter of preliminary training is of minor importance. The intellectual grasp

and the attendant power of lucid and logical statement that thorough and systematic and extended preliminary training is supposed to give are with such men natural endowments. But the law teacher knows that such cases are exceptional, and that, while standards may, within proper limits and subject to proper restrictions, be waived to meet the occasional exceptional case, it is with the average, rather than with the exceptional, man in view that they should be determined upon and fixed. To one who has given attention to the situation it is quite apparent that the law teacher must be the leader in the matter of advancing preliminary standards. He is more closely in touch with the law student than is the practitioner, and he has more clearly defined notions as to his needs. Moreover, he is thoroughly alive to the importance of substantial preliminary requirements, while the average practitioner is unaccountably indifferent. The practitioner may follow the teacher in such matters—he usually does after a fashion—but he rarely takes the initiative. He regards his profession as a learned one, but he too often forgets that a profession, in order properly to be ranked as learned, must have a substantial basis in general culture and intellectual acquirement. The immediate field of the law teacher in the matter of preliminary requirements is, of course, the law school, and his work in that field has yielded most encouraging results. The average university law school of two decades ago had practically no requirements for admission. Now a high-school course of four years is the ordinary requirement. In several schools one year of college or university work either now is or soon will be required, while in a few two years of such work are exacted. It is probable that in the near future the equivalent of at least two years of college or university work will be the general requirement for admission to university law schools, and that the list of those schools that require of their matriculates the college or university degree will be somewhat enlarged. And this will be the direct result of the work of the law teacher. That the influence of his efforts in this regard is not confined to the schools, but that it is reaching the public and the profession, is seen in the fact that in many of the states the laws regulating admission to the bar have been materially improved, not only in providing for more thorough preparation in the law, but also in requiring of the candidate at least a high-school training. It is well known that some of this legislation has been suggested by law teachers, and all of it has undoubt-

edly been more or less inspired by the example of the law schools in raising the standards.

But the work of the law teacher in this field is by no means done. Indeed, the preliminary and professional requirements of the schools in some sections are likely to be materially affected by the laws governing admission to bar examinations and by the attitude of examining boards. The difficulties that confront the law schools are not fully appreciated. It is not generally understood, I think, that in the matter of advancing preliminary standards they are distinctly at a disadvantage as compared with the medical schools. In practically every state at the present time, before one can be admitted to an examination for a license to practice medicine he must show to the examining board that he has been graduated from some reputable medical college, while graduation from a law school is not a prerequisite to an examination for admission to the bar in any state. The medical schools, therefore, are a necessary part of the legal machinery governing admission to the practice of medicine, but the law schools are not a necessary part of the machinery governing admission to the bar. The medical schools may advance their standards, both preliminary and professional, and students must meet them or stay out of the profession; but no such result follows the raising of law-school standards, for the way to the bar through the office and examining board remains open. As a matter of fact, the leading law schools of the country are in their preliminary standards, and most of them are in their professional standards, distinctly in advance of the examining boards. It is doubtful if law-school graduation could be generally made a prerequisite to admission to bar examinations, and the wisdom of such a requirement might be seriously questioned; but that the preliminary and professional requirements of the examining boards should be equal to the requirements of the leading law schools, particularly of the state schools where there are such, cannot admit of doubt. To aid in bringing about such a condition is certainly within the legitimate functions of the law teacher.

The life of the law teacher is a quiet one, and to the public, and possibly to the profession, it may seem to be one of limited opportunities and of small responsibilities. But is it? It could hardly be said to be so, even if it compassed no more than his daily routine of study and instruction and his general work in the field of legal education; but when it is remembered that, in the exercise of these and other functions herein set forth, he brings to bear a distinct

molding force upon the young men who are committed to his care and direction, and that to a large degree their futures are determined, not only by the quality of his instruction, but by his example and influence, the real opportunities of his life and the serious responsibilities of his calling must be appreciated. Neither the profession nor the public can regard the work of the law teachers as unimportant or the responsibilities as slight when confronted by the fact that the professional standards of the future are really in their hands. The influence that is exerted in the training in the principles of the law and in the ethics of the profession of seventy per cent. of the young men who come to the bar is certainly far-reaching; and no conscientious teacher can devote his life to work in this field without a profound sense of the responsibilities that attach to the calling.

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